From Achmea to Komstroy

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In a recent landmark decision *Moldova v. Komstroy*, the Court of Justice of the European Union (CJEU) on 2 September 2021 found intra-EU investment arbitration under the Energy Charter Treaty (ECT) incompatible with EU law. After having already ruled that investment arbitration on the basis of an intra-EU bilateral investment treaty (BIT) contravened EU law in *Achmea* in March 2018, the CJEU now transposed the reasoning in *Achmea* to the ECT.

The ECT is a multilateral treaty, which includes investor-state-dispute settlement (ISDS) and has more than 50 parties, including the EU and all EU member states (except Italy). Given the fact that roughly 60 per cent of ISDS cases under the ECT have been between an EU member state and an investor from another EU member state (intra-EU), the judgment by the CJEU has major implications. Recourse to the ISDS under the ECT has recently been used by the German energy companies RWE and Uniper against the Netherlands to receive compensation for the planned coal phase-out (cases still pending). There are also further proceedings pending before the CJEU concerning the compatibility of EU law with the current version of the ECT (*Italy v Novenergia and Athena*) and the EU proposal for a modernized version of the ECT (Belgium's request).

This blogpost briefly analyses the CJEU's judgment in *Komstroy* insofar as it addresses the incompatibility between intra-EU investment arbitration and EU law. The finding that intra-EU disputes under the ECT are incompatible with EU law hardly comes as a surprise, but the way the CJEU got there is somewhat surprising.

The CJEU's Jurisdiction to Interpret the ECT

Arguably, the CJEU would not have had to address the question of compatibility between EU law and intra-EU arbitration in *Komstroy*. The underlying investment dispute was commenced by a Ukrainian investor against Moldova. The seat of arbitration was Paris and the award rendered by the arbitral was challenged before the Paris Court of Appeal, which initiated a preliminary reference procedure before the CJEU. However, the questions referred to the CJEU only concerned the scope of 'investment' under the ECT – the question of compatibility between EU law and the ECT did not form part of the questions posed by the Court of Appeal. Thus, the CJEU could have avoided the question of computability at this juncture and could have postponed this debate to one of the above#mentioned pending cases directly raising this issue.

Consequently, as a starting point of its decision, the CJEU clarified that it had jurisdiction to interpret the ECT (see paras. 21–38). This analysis will not address this matter in detail. Suffice it to say, the CJEU arguably went out of its way to establish jurisdiction here, although the underlying investment dispute did not involve any EU investor as claimant or EU member state as respondent. However, the court

emphasized that a future case between an investor from outside the EU and an EU member state could involve the same questions concerning the scope of 'investment' and thus, a uniform interpretation of the ECT was 'in the interest of the European Union' (paras. 29, 31). It is questionable whether any arbitral tribunal would even follow the interpretations provided by the CJEU since the ECT does not explicitly confer any powers on the CJEU to authoritatively interpret the ECT. As a matter of EU law, the interpretation given may be binding since the CJEU considered the ECT as 'act of EU law' (see below), but arbitral tribunals will not necessarily regard it as an authoritative interpretation (see *United Utilities v Estonia* [2019] para. 540). Even more so since there is no system of precedent in international arbitration. In any event, after the conclusion that it has jurisdiction, the CJEU could have gone straight to the questions referred to it (see paras. 67–85). Rather, it decided to start with the question of compatibility between intra-EU ISDS under ECT and EU law.

In For a Penny, in for a Pound: Applying *Achmea* to the ECT

As discussed elsewhere (see e.g. here and here), the major problem in *Achmea* was the applicable law clause of the respective intra-EU BIT, which allowed for the application of EU law as part of 'the law in force of the Contracting Party concerned' (i.e. domestic law) and 'relevant agreements in force between the parties' (i.e. international law) undercutting the monopoly of the CJEU on interpreting EU law.

Arguably, it was plain that the conclusions of *Achmea* must also apply to the ECT since the applicable law clause of the ECT is similar enough. Article 26(6) ECT stipulates: 'A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.' One could have expected the CJEU to find that EU law formed part of the 'applicable rules and principles of international law' (see here). Interestingly, the CJEU rather pointed out that since the ECT was an international treaty which had also been concluded by the EU (paras. 23–24), the ECT 'itself is an act of EU law' (para. 49) and thus, an arbitral tribunal under 'Article 26(6) ECT is required to interpret, and even apply, EU law' (para. 50).

Like in *Achmea* the CJEU then addressed the fact that arbitral tribunals could not refer questions of EU law to the CJEU and domestic courts, which could refer questions to the CJEU when being confronted with an application to enforce or set aside awards, only had a limited power to review awards (para. 57). As a result, arbitral tribunals in intra-EU disputes may interpret or apply EU law without the involvement of the CJEU, which is a threat to 'autonomy and […] the particular nature of [EU law]' (para. 63).

According to the CJEU, the fact that the ECT is a multilateral treaty does not alter this conclusion, because in reality the ECT consists of various bilateral relations between two of the contracting parties, comparable to the BIT at issue in *Achmea* (para. 64). In contrast, investment tribunals had drawn on the fact that the ECT was a multilateral treaty as one ground to distinguish it from the *Achmea* reasoning (see e.g. *Masdar v Spain* [2018] para. 678).

Thus, while the ECT 'may require Member States to comply with the arbitral mechanism' in disputes between investors from third states and an EU member state, 'preservation of the autonomy and of the particular nature of EU law precludes the same obligations under the ECT from being imposed on Member States as between themselves' (para. 65). As a result arbitration under Article 26(2)(c) is not applicable for intra-EU disputes (para. 66).

The Future of Extra-EU Arbitration Under the ECT

This ruling by the CJEU finally clarifies what many had suspected (see e.g. here; see also *Cavalum v. Spain* [2020] para. 356.): the *Achmea* reasoning applies to intra-EU investment arbitration under the ECT. As a matter of EU law, intra-EU ISDS under the ECT is not legal. However, there may also be implications for extra-EU disputes under the ECT. The CJEU did not conclude in para. 65that the ECT requires Member states to respect ISDS with investors from outside the EU, but merely that it 'may require'. This cautious language may be important since the current version of the ECT does not foresee the model of ISDS involving a permanent investment court. The latter forms part of CETA and other new EU investment treaties and received the green light from the CJEU (Opinion 1/17). In contrast, *ad hoc* investment arbitration in investment treaties concluded between the EU or member states and third states has not been addressed by the CJEU yet.

Moreover, it is not entirely clear whether EU law might not also form part of the applicable law in extra-EU disputes under the ECT. The conclusion that 'the ECT itself is an act of EU law' (para. 49) as well as the fact that the reference in Article 26(6) ECT to 'applicable rules and principles of international law' could in theory lead to EU law being part of the applicable law in an extra-EU dispute involving an EU member state as respondent and an investor from a third state as claimant. Again, there would be no possibility to submit a request for a preliminary ruling to the CJEU. In Opinion 1/17 the CJEU did not identify any incompatibility with EU law in the fact that CETA as a mixed agreement was also part of EU law applied by the CETA tribunal – as long as no other EU law could be applied by the tribunal (Opinion 1/17, paras. 120-136). The 'applicable rules and principles of international law', however, goes beyond the provisions in CETA and could involve other EU law in addition to the ECT. These issues might be addressed by the CJEU when deciding on the Belgian request for a ruling concerning the proposal for a modernized ECT.

Case Closed?

The judgment by the CJEU is another nail in the coffin of intra-EU investment arbitration. There is no doubt that the CJEU regards the ECT as inapplicable for intra-EU disputes and as a matter of EU law no arbitration proceedings can be initiated against an EU member state by an investor from another EU member state. As a matter of international law, little will change until the EU member states decide on how to implement *Komstroy*. The *Achmea* ruling eventually led most of them to conclude a plurilateral treaty for the termination of intra#EU BITs (see here). Until the EU convinces the other contracting parties of the ECT to modify the ECT to the effect that intra-EU arbitration is excluded, arbitral tribunals will continue to exercise jurisdiction over any new proceedings initiated after this ruling (see here).An

alternative to modification is also a withdrawal from the ECT and the judgment might strengthen the position of those states willing to withdraw. It is not yet clear whether a consensus will emerge among the EU member states. In any event, awards rendered in favour of investors in intra-EU disputes will now become very difficult to enforce before domestic courts of EU member states since they would arguably violate EU law if they enforced an award. Accordingly, while *Komstroy* seems to be the final chapter of the *Achmea* saga, there may still be room for an epilogue from member states, arbitral tribunals and domestic courts – and at the end of the day, the CJEU.
